Filed 11/24/08 In re David B. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DAVID B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DAVID B., Defendant and Appellant.	G039293 (Super. Ct. No. DL013740) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Ronald P. Kreber, Judge. Affirmed.

Soheila Hosseini for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

David B., a minor who is also the uncle of the victim, appeals a juvenile court finding he committed one count of continuous sexual abuse and one count of distribution of pornography to a minor and ordering he be committed to a juvenile facility for one year and be subject to probation thereafter. He argues that the court erred in allowing a child witness to testify and his trial counsel was ineffective on various evidentiary matters. We affirm.

I. FACTS

Under the original complaint filed pursuant to Welfare and Institutions Code section 602 on November 29, 2005, the Orange County District attorney alleged David, a then-fifteen-year-old student, violated two different sections of the Penal Code: section 653k for carrying a switch-blade knife, and section 626.10, subdivision (a), for possessing that weapon on school grounds.

Although the first count was eventually dismissed on July 26, 2006, a petition subsequent filed on December 7, 2006 alleged that David committed continuous sexual abuse in violation of Penal Code section 288.5, subdivision (a). The day before, David's five-year-old niece told her mother that he had been touching her in a sexual manner. It soon appeared that David had showed the child a pornographic video, so the petition subsequent was amended the next day to also allege that David also distributed pornography to a minor in violation of Penal Code section 288.2, subdivision (a).

Because her testimony is crucial to the resolution of David's argument on appeal regarding the competency of the five-year-old, we will now quote it at length. After asking the child her name and birthday, and establishing that she was five years old, the prosecutor and the child engaged in the following colloquy:

"Q: All right. First, do you know the difference between the truth and a lie?

"A: Um, no.

"Q: You don't?

"A: (Shakes head.)

"Q: What if I said it was raining in here?

"A: Um, you would –

"Q: Is that a truth or a lie?

"A: A lie.

"Q: Why is it a lie?

"A: Because it's not raining.

"Q: Perfect. What if I said that you had a blue shirt on? Is that a truth or a lie?

"Q: Truth.

"A: Why?

"Q: Because I do have a blue shirt on.

"A: That's right. . . .

"Q: . . . I'm going to show you a teddy bear that's right in front of me. What if I said this teddy bear was white? Is that a truth or a lie?

"A: Truth.

"Q: Why is it the truth?

"A: Because it is white.

"Q: . . . I'm going to ask you to do something for me today – and for all of us. Can you promise to tell the truth while you talk to us today?

"A: Um, yeah."

The juvenile court also asked the child witness whether she promised to tell the truth, to which she replied, "yeah." The court then stated, "All right. The court has listened to the questions and the responses, and the court would make a finding that the witness is qualified to testify. You may proceed."

As the child's testimony proceeded, she indicated that she had seen a pornographic video and that David had sexually abused her. She could testify as to certain details of the video, but could not remember if David said anything to her when he showed it to her, or what he did with the video after they watched it. Although she did not know the exact number of times David touched her or exposed himself to her, she

was able to testify "yeah" when asked whether it was more than one time, two times, three times, and four times.

When asked whether the door to David's room was opened or closed when she was in the room with him and he touched her, she responded, "closed and locked," but could not remember if David locked it every time he touched her.

David's trial counsel later objected to the finding that the child was competent to testify. She said, "I felt that [the child] was incompetent. I sought law and it says that the judge the court is to determine the competency of a child -- has to determine whether the witness understands the nature of an oath, realizes the moral duty to tell the truth, and understands the prospect of being punished for a falsehood."

The juvenile court judge denied the motion, stating: "The Court would find her to be competent. I believe the questions that were proposed to her, the responses were clear, and I don't see where the victim changed her mind in any particular question. She may have had a question regarding understanding a question, but that would be normal. The court was satisfied, but since you are bringing up an objection at this time, the court would find that the witness was competent. [¶] The court was impressed with her listening ability, and the questions did not suggest an answer. The court would find from circumstantial evidence that she understood the area of falsehood and giving false information or testimony to the court, and she understood the purpose of the oath was to tell the truth in this matter, and that was her duty. As a child witness goes, with her age, the court found that she was quite competent to testify."

Next, the child's mother testified, followed by David himself. The mother testified that the child "had been acting out on her cousin" in "the middle of 2006" by touching her and that the child had said that what David did to her was "where I learned these things from." Defense counsel repeatedly tried to put forth the theory that the child instead learned this behavior from observing her mother in motels. The trial judge, however said that such questioning "may just be an attempt to cloud up the waters of a trial, and I don't see where it's going to any type of facts regarding the victim's credibility as to what took place between minor and victim."

The mother also testified that her daughter lies, and that in "certain situations" she has been known to have fabricated things "so she doesn't get in trouble."

Over the next four days of the juvenile court trial, the investigator who found the pornographic videotape under David's bed testified, as did David's younger brother with whom he shared a room, and the social worker who investigated the allegations of abuse.

David's girlfriend at the time the abuse took place also testified. She said that she spoke to David on the phone for two or three hours one night over one of the weekends David was alleged to have molested the five-year-old. David's trial counsel tried to introduce into evidence a cellular phone bill as evidence of this conversation, but the trial court sustained the prosecution's objections for lack of foundation, cumulative evidence, and hearsay.[1]

David's trial counsel ultimately cross-examined each of the witnesses called by the prosecution.

At the conclusion of trial, the juvenile court ordered David to be committed for 365 days to a juvenile facility and thereafter to be released on probation to his parents under specified terms and conditions. It is from this judgment that David appeals.

II. DISCUSSION

A. Competency of the Child to Testify

We review the competency question for abuse of discretion, in light of the burden on the appellant to prove disqualification. (See *People v. Mincey* (1992) 2 Cal.4th 408, 444 ["The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion."].)

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[1] The prosecutor objected: "Hearsay, your honor. The witness has already testified to it. Her reading in something that is a bill to her father would, one, be lack of foundation, lack of knowledge, as well as hearsay."

Here, the trial court's competency was clearly within the bounds of reason, and David has not carried his burden of establishing incompetency as a matter of law.

The deputy district attorney took ample time when she first called the five-year-old as a witness to show that she could distinguish between true statements and falsehoods. Although it is true the child originally said she did not know the difference between the truth and a lie, we are in accord with an older appellate case that still represents good law that says such an isolated statement is not enough to disqualify a witness, when, looking at the testimony as a whole, it is clear that she in fact did know the difference between a truth and a lie, and saw an internal need to be accurate. Significantly, not only did this five-year-old candidly admit when she did not know an answer, but she deliberately clarified her answers when she realized she misspoke: "Q: When you go to David's house, who do you hang out with at David's house? A: We go – we go down the street. Q: Okay. A: Wait. Up the street." (See *People v. Dant* (1924) 68 Cal.App 588, 591-592.) Here, not only was the five-year-old able to identify certain statements the deputy district attorney made as truths or lies, but she was also able to explain *why* they were truth or lies.

David's argues that there was evidence (also mentioned below) that the five-year old had fabricated stories in the past. But that is just a matter of credibility, not capacity. (See *People v. Mincey, supra,* 2 Cal.4th at p. 444 ["Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony, however, do not disqualify a witness."].)

B. The Effectiveness of
David B's Trial Counsel

David next complains of a host of reasons, no less than ten, as to why his counsel ineffectively assisted him at trial.

Before we reach those specifically, however, we set forth the controlling two-prong test for ineffective assistance of counsel as articulated in the Supreme Court case of *Strickland v. Washington* (1984) 466 U.S. 668. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Id.* at

688.) This reasonableness is under prevailing professional norms and "considering all the circumstances." (*Ibid.*) Second, "the defendant must show that counsel's performance was deficient" (*id.* at 687) such that the deficiency is "prejudicial to the defense."[2] (*Id.* at 692.) *Both* prongs of the test -- that is, both deficiency *and* prejudice -- must be proved to this Court by David by a preponderance of the evidence in order for him to successfully prove ineffective assistance of counsel. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1257 [" The burden is on [defendant] to demonstrate by a preponderance of the evidence that counsel's performance was inadequate and fell below an objective standard of reasonableness."].)

David's ten reasons as to why his counsel ineffectively assisted him at trial really fall into four categories which we will now discuss separately.

1. Objections

David complains that his trial counsel had to withdraw her objections throughout trial because she failed to provide adequate offers of proof. His argument is as follows: "Here, the trial counsel made some timely and prompt questions and objections throughout the trial. However due to her inability to provide a legitimate, legal and on point offer of proof to reasons for her question and/or objections, she had to withdraw her questions/objection."

David later fleshes out his argument a little bit. He notes that when the five-year-old was questioned by the deputy district attorney, she was asked, "was the door open or closed?" The response was, "closed and locked." The deputy district attorney then went on to ask her who locked the door.

David argues that his trial counsel failed to represent him effectively because he should have objected that "locked" was a non-responsive answer that should be stricken from the record.

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[2] In some instances, such as where counsel has a conflict of interest, the state interfered with counsel's assistance, or there was actual or constructive denial of counsel, prejudice is presumed to have been met, and the defendant does not have the burden of proving the second prong of the *Strickland* test. (*Strickland, supra,* 466 U.S. at pp. 691-692.) However, none of these circumstances are alleged to have been present in this case. Therefore, there is no presumption and David has the burden of proving prejudice. He cannot prevail until he does so.

While it is true that, technically, trial counsel *could* have objected to the child witness's testimony, that doesn't mean she was required to do so in order to maintain the standard of care she owed David. Decisions on whether or not to make an objection are classically within the discretion giving to trial counsel (e.g., *People v. Torres* (1995) 33 Cal.App.4th 37, 48 ["Generally, the failure to make objections is a matter of trial tactics which appellate courts will not second-guess."] and there must be "no satisfactory explanation" before a non-objection to proffered evidence rises to the level of ineffective assistance (*ibid*).

There appears to have been a reasonable tactical purpose not to object. Defense counsel would probably not want to emphasize the fact that David and the five-year-old were behind locked doors at certain times -- and the trier of fact would have heard that fact at least twice if there had been an objection. The reasonableness of trial counsel's is underscored when one realizes that any objection might have been readily cured by the prosecutor with the next question.

2. Laying Proper Foundation

David argues that his counsel ineffectively assisted him by not properly getting a phone bill that reflected a long phone conversation between David and his girlfriend into evidence. The trial court did not admit this piece of evidence when it sustained the deputy district attorney's objection that the phone bill was hearsay and cumulative evidence.

Here, the problem is lack of prejudice. It is hard to see how the non-admission of the phone bill prejudiced David in any way. Would it, as he argues, have "raised reasonable doubts as to when [David] found the time to molest the victim, considering that [he] came home late everyday?" No, because this is a case of *continuous* sexual abuse. Being on the phone for two hours one day would have done nothing to negate the alleged actions on other days. And in any event, the use of a cell phone does not necessarily preclude the possibility of simultaneous child molestation or pornography-viewing with that child.

Besides which, the defense still got its point (David was otherwise preoccupied) across. David's girlfriend, just prior to being asked about the phone bill David hoped would get admitted into evidence, testified that she talked to David "by phone" for "two or three hours" at "around 10:30" at night.

3. Calling Witnesses

David argues his trial counsel ineffectively assisted him when she failed to call the child "victim's friends or other family members regarding a social or behavioral history of the victim" to find out how she "learned to act" in a sexual manner toward her cousins. In context, this argument is close to frivolous. Evidence Code section 782[3] does not allow the questioning of sexual abuse victims about their sexual histories, and that rule surely applies when questioning a five-year-old child. Trial counsel wisely decided not to irritate the trier of fact by trying to put the five-year-old herself on trial.

4. Cross-Examination of Witnesses

David has a lot of suggestions as to how his trial counsel should have cross-examined various witnesses. He sums them up: "the trial counsel failed to cross examine the child witness regarding any marking on [David]'s body, failed to question … her regarding her observation of other people's sexual activity, failed to question the child witness as to the circumstances surrounding the porn movie playing, failed to question the child witness regarding other family member's attempt[s] to enter the room while being molested, and failed to question the child witness regarding her daily schedule as well as her knowledge of [David]'s daily schedule."

The extent of cross-examination is a classic tactical decision trial counsel must make. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746 ["normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make."].)

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[3] Which prevents counsel from calling witnesses to attack the credibility of the complaining victim based on any evidence of her sexual conduct in matters not at issue at trial without first making a written motion accompanied by an affidavit with an offer of proof.

Here, trial counsel conducted an adequate cross-examination of a five-year-old witness, perhaps one of the most delicate tasks which a defense counsel must undertake. It is understandable that wise defense counsel would not wish to unduly prolong the child's testimony, or dwell on facts that might only emphasize the molestation. We must also remember that trial counsel did an excellent job, in testimony elicited from the mother, of bringing out the five-year-old's tendency to "fabricate[] things." That suggests a reasonable trial strategy of attacking the five-year old's credibility from afar, so as to avoid an unseemly "grilling" of a child victim.

III. DISPOSITION

The order finding the allegations of the December 7 and December 8, 2006 petitions to be true is affirmed.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.